DOCUMENT RESUME

ED 213 811 UD 022 166

AUTHOR Reynolds, William Bradford
TITLE Enforcement of Federal Civil Rights Laws in the Reagan Administration.
INSTITUTION Department of Justice, Washington, D.C.
PUB DATE 13 Mar 82
NOTE 16p.; Paper presented at the Annual Meeting of the Labor Policy Association, Inc. (Williamsburg, VA, March 13, 1982).

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *Affirmative Action; *Civil Rights; Civil Rights Legislation; Court Litigation; Employment Practices; *Equal Opportunities (Jobs); Government Role; *Law Enforcement; *Racial Discrimination; Sex Fairness
IDENTIFIERS *Civil Rights Act 1964 Title VII; Reagan Administration

ABSTRACT

In this statement, William Bradford Reynolds, Assistant Attorney General, discusses the Federal government's enforcement policies and activities regarding equal employment opportunity, and defends the Reagan Administration and the Justice Department against charges cited in a report by the Leadership Conference on Civil Rights. Reynolds contends that the Administration's civil rights policies are based on the principle that discrimination is morally wrong, but the remedial use of preferential hiring and promotion techniques violates rather than promotes the principle of equal employment opportunity. He also contends that although the "color-blindness" principle established by Title VII enabled minorities to compete effectively with members of other groups, employment preferences serve to hire and promote with discrimination. Reynolds suggests that the use of racial quotas has not necessarily resulted in the hiring of unqualified employees, but in the hiring of lesser qualified employees on the basis of race or sex. Reynolds concludes that adherence to the color-blind and sex-neutral ideal of equal opportunity is essential for the reduction of discriminatory practices in employment. (JCD)

**********
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
**********

ED213811

# Department of Justice

ENFORCEMENT OF FEDERAL CIVIL RIGHTS LAWS
IN THE REAGAN ADMINISTRATION

REMARKS BY

WILLIAM BRADFORD REYNOLDS
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

BEFORE

THE

LABOR POLICY ASSOCIATION, INC.

Saturday, March 13, 1982
Williamsburg, VA

UD 022 166

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
✓ This document has been reproduced as received from the person or organization originating it.
☐ Minor changes have been made to improve reproduction quality.
• Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

ENFORCEMENT OF FEDERAL CIVIL RIGHTS LAWS
IN THE REAGAN ADMINISTRATION

It is indeed a privilege for me to address this distinguished organization on the subject of equal employment opportunity. Because enforcing federal nondiscrimination guarantees against public employers is a major component of the Civil Rights Division's responsibilities, I have spoken and no doubt will speak frequently on the subject of this Administration's enforcement policies and activities in this area. This occasion, however, is particularly timely, for it falls on the heels of publication by the Leadership Conference on Civil Rights of a report on the Justice Department's civil rights activities during the Reagan Administration's first year in office.

The report, which is entitled "Without Justice," strongly attacks the Justice Department on a wide range of civil rights issues, charging, for example, that the "basic qualities of fair-mindedness and fidelity to law are lacking" at the Department, and that "[i]nstead, power and prejudice hold sway." A response to the Report certainly cannot accuse its authors of mincing words. To the contrary, those involved in the drafting chose their words carefully so as to attract considerable media attention, excite emotions, and convey a negative bias to the American public. The supporting data and argumentation has been chosen with equal care, with principal reliance placed on news accounts, "unidentified"

sources, and selective paraphrases of official statements and testimony lifted out of context.

On the whole, the Leadership Conference Report is an interesting study in manipulative special-interest advocacy, adding for the most part empty accusations and inflammatory hyperbole to the legitimate public debate concerning the many critical issues arising in the civil rights area. This is not to suggest that the authors of the report do not have genuine differences with the Administration on certain matters of policy and legal interpretation. They obviously do, and in no small measure, those differences are reflected in the Report. But the manner in which they have elected to convey their differences does little to advance the thoughtful attention that is so desperately needed on such critically important issues. Let me today single out one area addressed in the Leadership Conference Report that is of particular interest to all of you -- I speak of the general topic of equal employment opportunity. In so focusing my remarks, I do not mean to imply that this topic is the reports' Achilles' heel; the other points covered in the report are equally unconvincing when reviewed with any measure of objectivity.

As I have stated on a number of occasions, this Administration's civil rights policies and enforcement activities are guided by a single fundamental principle: that discrimination

based on race, sex, creed, or ethnic origin is wrong -- morally wrong. The chapter of the report dealing with this Administration's policies and activities in the employment area is entitled: "Equal Employment Opportunity -- Ignoring the Experience of Decades." Thus, before proceeding to a discussion of the report's specific points, it seems fitting to reflect briefly upon the evolution of the fundamental legal and moral principle of equality of opportunity for all Americans.

Over 85 years ago, Justice John Harlan, the Elder, said in his famous dissent in Plessey v. Ferguson, 163 U.S. 537, 559 (1896): "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. . . . The law regards man as man, and takes no account of his surroundings or of his color." The rest of the Justices, however, disagreed with Justice Harlan's view of the Fourteenth Amendment, concluding that "in the nature of things it could not have been intended to abolish distinctions based on color. . . ." Id. at 544. Thus, the Supreme Court ruled that Mr. Plessey, who was one-eighth black, could be excluded by law from the railroad car reserved exclusively for whites. In so ruling, the Court wove into the fabric of our Nation's history the shameful separate-but-equal doctrine.

Years later, in 1944, Justice Murphy wrote in Korematsu v. United States, 323 U.S. 214, 242 (1944): "Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is . . .

utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States." Sadly, these words were also written in dissent, the majority ruling that the Government is constitutionally authorized to exclude United States citizens of Japanese ancestry from certain areas in California.

The principle so forcefully articulated by Justices Harlan and Murphy, however, ultimately prevailed, and in Brown v. Board of Education, 347 U.S. 483 (1954), the Supreme Court finally overruled Plessey v. Ferguson, holding that separate educational facilities are inherently unequal. Although it was overruling more than half a century of Supreme Court jurisprudence, the court acknowledged with eloquent simplicity the primacy of the constitutional right at issue: "At stake," said a unanimous court, "is the personal interest of the plaintiffs in admission to public schools . . . on a [racially] nondiscriminatory basis." Brown v. Board of Education, 349 U.S. 294, 300 (1954).

The Brown decision spurred a judicial and legislative quest to condemn racial discrimination, both public and private, in virtually every aspect of American life. The courts have, since Brown, consistently denounced distinctions based on race as being by their very nature, in Chief Justice Stone's words, "odious to a free people whose institutions

are founded upon the doctrine of equality." Loving v. Virginia, 388 U.S. 1, 11 (1966), quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

Congress has likewise made clear its abhorrence of racial discrimination, enacting initially the Civil Rights Act of 1957, aimed at assuring equal voting rights -- and, incidently, establishing within the Department of Justice an Assistant Attorney General for Civil Rights. Following that enactment, there came a steady flow of national civil rights legislation: The Civil Rights Act of 1960 (voting); the Omnibus Civil Rights Act of 1964 (public accommodation, school desegregation, federal programs, employment, etc.); the Voting Rights Act of 1965; and the Civil Rights Act of 1968 (fair housing) -- to name but a few of the milestones in this area. And this activity by Congress has continued through the current session, where extension of the Voting Rights Act is now being debated.

Moreover, since 1954 the American people have progressed in the vital area of civil rights both attitudinally and statistically. Our national consciousness has been raised, and the profound injustice of discrimination on the basis of immutable and irrelevant personal characteristics, such as color, is broadly recognized and condemned. As a consequence, racial and other stereotyping is declining, and most Americans

now accept the legal and moral imperative to treat individuals equally, regardless of race, color, sex or national origin. Unfortunately, there are exceptions, and enforcement action under the civil rights laws is still required. But it is important, in my view, to recognize and to appreciate that such circumstances are the exception and no longer the rule.

The federal civil rights laws assign primary enforcement responsibilities to the Attorney General -- who in turn has delegated them to the Civil Rights Division. Thus, over the years, the Division has initiated hundreds of enforcement actions and has participated in many of the thousands of class-actions brought by private citizens. It traditionally has been -- and most assuredly will continue to be -- on the cutting edge of the federal government's involvement in the effort to eliminate unlawful discrimination through federal court litigation.

That we are continuing in this Administration to attack employment discrimination as vigorously and uncompromisingly as prior administrations is amply demonstrated by our enforcement record. During the past year, we have filed 6 new cases against public employers, alleging employment discrimination on grounds of race or sex. During the same period, 6 inherited cases have been litigated, and in 3 others, we have obtained consent decrees. I have also authorized

8 new employment discrimination suits, which are presently being negotiated, a.d there are 9 other complaints we have received that are under investigation and are likely to result in lawsuits. And these new initiatives are in addition to the substantial number of active employment cases that we inherited from the prior Administration and are continuing to prosecute.

Despite this solid record of enforcement activity, which demonstrates, I submit, the depth and sincerity of this Administration's commitment to continuing the battle against unlawful employment discrimination, the Administration has been accused by some groups of abandoning the principle of equal employment opportunity. The obvious question is "Why?" And to that there is, I submit, an equally obvious answer: Because we have dared to question -- and having questioned, to reject -- the remedial use of hiring and promotion preferences, which we believe violate rather than advance the principle of equal employment opportunity. It is on this policy that the authors of the Leadership Conference Report focus most of their criticism.

Those who collaborated on the report initially attempt to make the case in support of remedial imposition of preferential hiring techniques, which, as the report candidly admits, "necessarily involve individual members of a protected class

who may not themselves have suffered past discrimination by the employer in question." (p. 39) According to the report, "[a]lmost from the start, it was clear that mere injunctions against future discrimination would be insufficient to reform long-standing practices and the effects of ingrained prejudices." (Id. at 38) Therefore "concrete steps" such as employment preferences were considered necessary "to insure that members of the previously-deprived class in the future [were] hired and promoted without discrimination." (Id. at 39)

Let me respond. The contention in the report that injunctions against racial discrimination proved insufficient to remedy violations is historically inaccurate. The available objective data indicates that during the 1960's, minorities made significant educational and economic strides in the labor force under statutory and decisional law enjoining discrimination and granting "make whole" relief to individual victims of employment discrimination. Minorities thus demonstrated a capacity to compete effectively with members of other groups under a regime of color-blindness.

That a remedial approach anchored to the concept of color-blindness was intended by Congress in Title VII is clear from the statute's language and its legislative history. Title VII prohibits discrimination "against any individual with respect to his compensation, terms, conditions or privileges

of employment, because of such individual's race, color, religion, sex, or national origin . . ." (42 U.S.C. § 2000e-2(a)(1)). And, in the legislative debates preceding passage of Title VII, Senator Hubert Humphrey, the foremost proponent of the 1964 Civil Rights Act, unequivocally rejected the suggestion that Title VII was intended to countenance race-conscious preferences: "It is claimed that the bill would require racial quotas for all hiring, when in fact it provides that race should not be used for making personnel decisions." (110 Cong. Rec. 6553 (1964).

In like manner, remarks by other proponents of the legislation endorsed the view that Title VII established a principle of "color-blindness in employment." Id. at 6564. Indeed, in McDonald v. Santa Fe Trail Transportation Co., 422 U.S. 273 (1976), the Supreme Court interpreted Title VII to prohibit racial discrimination against white employees upon the same standards as would be applicable were they nonwhites.

The report's second premise -- that employment preferences are necessary to ensure that members of the previously deprived class are hired and promoted without discrimination -- is likewise incorrect. The simple fact is that remedial techniques which accord preferential treatment to members of certain groups operate to ensure that those group members are hired and promoted with discrimination -- discrimination in favor

of group members who had never been wronged by the employer and against other employees and applicants who are themselves innocent of any discrimination or other wrongdoing -- and all on the basis of race or sex. In essence, the report's rationale for employment preferences is that employers must be required to discriminate on the basis of race "to assure non-discrimination in the future." (p. 40) Aside from being a non sequitur, this reasoning is at odds with the language and history of Title VII and with the American ideal of equal employment opportunity for all citizens -- black and white, male and female.

Moreover, the Report's case for employment preferences seems grounded on the notion that the law guarantees equality of group results, as opposed to equality of individual opportunity. Under Title VII and similar nondiscrimination statutes, the right to be free from unlawful discrimination in the workplace is a personal, not a group right. Basing the remedial use of employment preferences solely on membership in a particular racial group is at odds with the personal right to equal opportunity protected under Title VII and, indeed, perpetuates the very type of discrimination that Title VII was enacted to eradicate.

The Leadership Conference Report also criticizes the Department's remedial approach in this area, which emphasizes a three-pronged formula consisting of (1) specific

"make whole" relief for identifiable victims of discrimination, (2) increased recruitment efforts aimed at the group previously disadvantaged, and (3) injunctive relief requiring color-blind and sex-neutral future hiring and promotion practices. The report's principal charges are that the Department's rejection of hiring and promotion preferences to remedy employment discrimination is not compelled by Supreme Court decisions on affirmative action and is not supported by "any evidence that current affirmative action policies have operated unfairly against . . . 'the previously advantaged group,' or have resulted in the hiring of unqualified employees." (p. 43)

To be sure, the Supreme Court has not outlawed the remedial use of racial and sexual preferences for nonvictims of employment discrimination, but neither has it ruled that such preferences must be used in order to remedy employment discrimination. Moreover, because an employment preference necessarily disadvantages one in order to bestow a benefit on another, the proposition that preferences based on race or sex operate unfairly against the person disadvantaged is so self-evident that it hardly requires a marshalling of evidence to sustain it. Indeed, the Report's refusal to recognize the unfairness inherent in all such discrimination,

regardless of the race or sex of the victim, breathes new life into the now famous lament of the late Professor Alexander Bickel, who said:

> The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: Discrimination on the basis of race is illegal, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told [by the authors of the Leadership Conference Report] that this is not a matter of fundamental principle but only a matter of whose ox is gored. A. Bickel, The Morality of Consent, 133 (1975).

It is simply no answer to the victim of reverse discrimination to say that remedial quotas lack the invidious character -- the stigmatizing effect -- of discrimination against minorities. The consequences of racial discrimination are as real and as unjust no matter "whose ox is gored." As one Supreme Court justice has put it: "[N]o discrimination based on race is benign, . . . no action disadvantaging a person because of his color is affirmative."

The Report also points to a lack of evidence that racial preferences "have resulted in the hiring of unqualified employees." The principal objection to the use of racial preferences, however, is not that they result in the hiring of unqualified employees, but that they result in the hiring of lesser qualified employees over those who are better qualified solely on the basis of race or sex. Acceptance of such a remedy is at war with the American ideal of equal

opportunity for each person to achieve whatever his or her industry and talents warrant and with the belief of right-thinking Americans that race and sex are irrelevant to employment decisions.

This Administration is firmly committed to the view that the Constitution and laws of the United States protect the rights of every person -- whether black or white, male or female -- to pursue his or her goals in an environment of racial and sexual neutrality. It is thus not we in the Justice Department who are "ignoring the experience of decades." It is not we who are arguing, under the banner of "affirmative action," that the fundamental principle of equal employment opportunity ought to be compromised and that discrimination on the basis of race or sex can at times be tolerated. Our Nation's sad history in this area signals the unmistakable warning that the first breach in the principle of racial equality, no matter how well intended or benign the motivation, inevitably makes the second a simpler task. As Justice Robert Jackson cautioned in dissent in the Korematsu case, once the concept of racial discrimination is validated, it "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."

Where employment preferences have been imposed, they have driven a wedge of resentment between fellow workers. The issue has divided the country, engendering new tensions

and threatening the hard-fought civil rights gains of the past three decades. In our view, adherence to the color-blind and sex-neutral ideal of equal opportunity for all -- the ideal that guided the framers of the Fourteenth Amendment and the drafters of Title VII -- is essential to preserving the national concensus condemning discrimination in the workplace, and holds the greatest promise of realizing the proclamation in the Declaration of Independence of equality for all Americans.



DOJ-1982-03